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APPEALS

Bankruptcy appeals offer unique opportunities to raise issues that may be significantly weaker or non-existent in a non-bankruptcy context. These materials, although not intended to be exhaustive, will attempt to highlight some of these unique bankruptcy appeal issues, as well as provide general guidance in this area. These materials attempt to deal with only those issues that are unique to bankruptcy cases. For reference, the Federal Bankruptcy Rules, Rule 8001-8020 contain the rules for appealing a bankruptcy order; the Local Bankruptcy Rules (LBR) 8001-1-8005-1 contains the local rules for appeals.

SETTING THE STAGE

Bankruptcy appeals are somewhat unique because they will likely involve the appeal of a particular order in the case that may have a significant impact on the case, but the case (and the operation of the company in a Chapter 11), absent an affirmative stay, will continue while the appeal is pending. A classic example of this is an appeal of confirmation of a plan. The confirmation of the plan is the moment that the company's reorganization is approved by the Court and the company emerges from bankruptcy. If confirmation is appealed, while the appeal is pending, the Company will be permitted to continue to implement its Plan. This may mean that the company will complete a refinance, be sold, close down a division, or do other things to implement its plan that will be hard, if not impossible to reverse if the appeal is overturned. Therefore, issues

of mootness, which will not exist in the appeal of a personal injury case for example, are central issues in most bankruptcy appeals. Unlike a non-bankruptcy appeal, in a Chapter 11 plan confirmation situation, the Debtor will move as quickly as possible to implement his plan so as to create a mootness issue. In fact, Local Bankruptcy Rule 8005-1 specifically states that "the filing of a notice of appeal does not stay the operation of the appealed order." This seems counterintuitive relative to the classic non-bankruptcy appeal, in which the status quo is preserved pending the appeal, and one risks advising a client to act on an order that has been appealed for fear it will be reversed or modified. The reverse is true in a bankruptcy appeal. The client should be advised to move as quickly as possible to implement the order from which the appeal is taken. For an appellant, such circumstances raise the issue of obtaining a stay pending appeal, which is an affirmative obligation of an appellant in a bankruptcy appeal, and may involve the posting of a bond.

STERN/ BELLINGHAM AND CORE VERSUS NON-CORE

Bankruptcy Courts exist under Article I of the Constitution. Bankruptcy Judges are not appointed for life. As a result, Bankruptcy Courts are not permitted to finally decide issues that do not involve the core of bankruptcy jurisdiction and can only be finally decided by Article III Courts. Recently there has been significant litigation over this issue in light of two Supreme Court cases, Stern v. Marshall 131 S. Ct. 2594, 2610 (2011), and Executive Benefits Ins. Agency, Inc. v. Arkinson (In re Bellingham Ins. Agency, Inc.), 573 U.S. ___ (2014), Basically, the cases say that a Bankruptcy Court is an Article I court, and if the Bankruptcy Court decides a non-bankruptcy matter, it must certify its findings of facts and rulings of law to the District Court, who must review such findings and rulings de novo. It remains unclear whether the parties can consent to final judgment in the Bankruptcy Court. There is a local rule, however, that has been

recently implemented to deal with this issue. It requires the litigant state whether it consents to the entry of a final order by the Bankruptcy Court at the outset of proceedings. NH Bankr. A.O. 7008-1. If the case is appealed, without a clear definition of what is a core bankruptcy matter, the standard on appeal could be a de novo review or the more limited appellate review. Usually, the Bankruptcy Court will put in its order that the order may be considered final or if found to be beyond the core of the bankruptcy court, to be considered findings of fact and rulings of law for the District Court to act upon de novo. It is important to consider these issues because they can be raised at any time and can upset in a significant way the posture of the case. Query what happens if the BAP decides a non-core proceeding?

See In re William C. Sheridan, 362 F.3d 96 (1st Cir 2004). In Sheridan the Court appointed a special counsel who initiated disciplinary proceedings against attorney Sheridan based upon Sheridan's conduct in a myriad of cases before the bankruptcy court. The bankruptcy court held a trial and issued an order suspending Sheridan for a year and requiring him to pay Michels' attorney's fees if he sought reinstatement. The Court did not rule upon whether the matter was core or non-core, and Sheridan did not raise the issue directly during the proceedings (except perhaps tangentially in a motion to reconsider). Sheridan appealed to the BAP, which affirmed. The First Circuit found that general disciplinary actions that were not case specific were not core proceedings and essentially vacated the order suspending Sheridan for lack of subject matter jurisdiction. The case was remanded unless and until the District Court issued a final appealable order. Id at 111.

WHEN TO ACT

A notice of appeal must be filed within 14 days of the entry of the order appealed from. The appellant has to designate whether it is appealing to the BAP or the District Court. FBR 8002.

Although the failure to comply with the time deadlines is an absolute bar to appeal, the rules do have some flexibility. First, if a party files a notice of appeal, any other party has 14 days to file a separate notice of appeal calculated from the date the first notice of appeal was filed. If you file an appeal too early, i.e. when the decision is announced rather than when the order is entered, the appeal will be deemed to be filed after the entry of the order. If the appeal is mistakenly filed with the wrong appellate court (the BAP instead of the District Court or vice versa) it will be deemed filed in the correct court. And the 14 days will not run until all post-trial motions to amend, make additional findings of fact, alter or amend the judgment or for relief from the judgment are ruled upon. All of these rules are contained in FBR 8002. Within 14 days of the Notice of Appeal, the appellant must designate the issues on appeal and by court practice order the transcript. Both the Notice of Appeal and Designation of the Record are filed only with the Bankruptcy Court. See LBR 8001-1, not with the District Court or BAP. When the Bankruptcy Court assembles the entire record it transmits it to the District Court (or BAP). The District Court or BAP will then issue a briefing schedule. The schedule will require the appellant to submit its brief within 14 days of the certification of the record, and the appellee will have 14 days after the appellant submits its brief to reply. The appellant will have 14 days after the appellee submits its brief to submit a reply brief. See FBR 8006, 8007, 8008, 8009 and 8010.

With regard to certain orders (that do not involve granting relief from the stay, sales or leases of property, authorizing the obtaining of credit, the assumption or assignment of an executory contract, approving a disclosure statement or confirming a plan, the bankruptcy court may extend the deadline to filing the notice of appeal. See FBR 8002(c). Once the Notice of Appeal is filed, any extensions of other deadlines should be requested by motion in accordance with FBR 8011. The Bankruptcy Court can decide procedural matters involving motions to extend

deadlines notwithstanding the Notice of Appeal. For example, a motion to extend the deadline to designate the record should be filed with the bankruptcy court, not the appellate court, particularly since the appellate court may not even have knowledge of the appeal yet.

WHERE SHOULD I FILE

You have a choice whether to file your appeal with the District Court or the BAP, and must designate your choice. Your appeal will be heard by the BAP unless the appellant elects the District Court in a separate writing filed at the time of the appeal or any other party elects within 30 days after the service of the appeal to have it heard in the District Court. 28 U.S.C. §158(c) (1); FBR 8001.

The issue of whether to go to the Bankruptcy Appellate Panel or the District Court is usually not all that clear. If you believe the bankruptcy judge is wrong on an issue of bankruptcy law, the BAP consists of other bankruptcy judges in the circuit. They certainly will have more direct expertise on bankruptcy issues. The District Court, however, will have more experience in general litigation matters.

CAN I APPEAL AS A MATTER OF RIGHT?

The next item to consider is whether the appeal is of a final order or an interlocutory order. 28 U.S.C. §158(a) states that the district courts shall have jurisdiction to hear appeals without first obtaining leave of the court from (1) final judgments, order and decrees, and (2) from interlocutory order and decrees on the narrow issue of a court's ruling on expanding or decreasing the exclusive period for the debtor to file a plan under 11 U.S.C. §1121(d). All other matters are interlocutory in nature and cannot be appealed without leave of the court. See 28 U.S.C. §158(a); Federal Bankruptcy Rule 8001.

Although certain orders, like confirmation orders, orders denying claims, orders granting

relief from the stay or denying discharge are typically final orders, the First Circuit will look at whether the order "completely resolves all issues between the parties with respect to the discrete dispute at stake in the ruling." See In re Calore Express Co., 288 F.3d 22 (1st Cir 2002). The issues of finality tend to arise in two contexts: (1) the nature of the order; and (2) whether denial of a motion is a final order, when the granting of such a motion would be a final order, i.e. the granting of a motion for automatic stay is a final order, but the denial of the motion is not a final order, unless it resolves the issues between the parties. See Caterpillar v. Braunstein, 261 B.R. 67 (B.A.P. 1st Cir 2001) (order denying relief is not a final order); but See Calore (the First Circuit suggests that in circumstances where the denial of relief from the stay is a final determination of the rights of the parties (such as in a situation where setoff is denied) then the order may be final.

Although each order that is not an obvious final order must be tested under the standard of whether the order "completely resolves the dispute" with respect to the matters "at stake in the ruling", there is some developed law on some typical bankruptcy motions and orders. An order approving or denying approval of a Disclosure Statement is not a final order. See In re Perez, 30 F. 3d 1209; In re P G & E 273 B.R. 795 (Bkcy. N.D. Cal. 2002). A denial of a motion to convert a case is not a final order. In re Hayes 220 B.R. 57 (N.D. Iowa 1998); an order denying the debtor's discharge is a final order. In re Lang 256 B.R. 539 (Bkcy. 1st Cir 2000). Sale orders are final orders. Precision Industries v. Qualitech Steel SBQ 327 F.3d 537 (7th Cir 2003); Grant of exemption is a final order, In re Orso 214 F.3d 637 (5th Cir 2000). The order fixing priority of creditor's claim is a final order even though amount of claim and its value remains to be determined. In re Kids Creek Partners 200 F.3d 1070 (7th Cir. 2000). Orders denying dismissal of bankruptcy case for substantial abuse are appealable. In re Koch, 109 F.3d 1285 (8th Cir. 1997). Order determining distribution priority was a final order. In re Weinstein, 251 B.R. 174 (B.A.P. 1st Cir 2000).

Bankruptcy Court order denying abstention is not a final order. In re C.R. Davidson Co., 232 B.R. 549 (Bkcy. 2d. Cir 1999). An order that says it is a "final order" is not a "final order" unless it meets the criteria for a final order. Courts will look at substance over form. See In re Fox 241 B.R. 224 (Bkcy. 10th Cir 1999).

As you can see it may not be absolutely clear whether a particular order is a final order. If the order is not a final order, it is necessary to file a motion for leave to appeal. This is accomplished by filing a notice of appeal along with a motion for leave to appeal. FBR 8001(b). The motion is supposed to contain the questions presented for appeal, the relief sought a statement of the reasons why an appeal should be granted, and a copy of the order appealed from. The opposing party has 14 days to respond. With regard to the standards for the granting of an interlocutory appeal, courts have differing views. The prevailing view seems to be that the granting of a motion for an interlocutory appeal is discretionary with the District Court. Stevens v. CSA 271 B.R. 410 (D. Mass. 2001) and may involve a finding that the order "is surrounded by finality or exceptional conditions that would warrant intervention." In re Salem Suede 221 B.R. 586 (D. Mass 1998). In this regard, an aggrieved party should at a minimum allege that the harm to the aggrieved party outweighs any harm or disruption to the debtor's reorganization efforts.

If you are unsure whether a particular order is final or interlocutory you can always file a notice of appeal and a protective motion that states that if the appeal is determined to be interlocutory and/or final that you have properly appealed within the period to do so. The rules in this area are fairly forgiving. FBR 8003 (c) states that if you do not file the required motion for leave to appeal, but you timely file the notice, the district court or BAP may consider the notice as a motion and rule upon the issue on the merits.

DOES THE BANKRUPTCY COURT LOSE ALL JURISDICTION ON APPEAL, HOW

DOES THAT WORK?

Once a matter is on appeal the bankruptcy court is divested on matters to modify any issues on appeal. The bankruptcy court does, however, retain jurisdiction over other issues not presented on appeal. See In re Big Rivers Electric Corp. 266 B.R. 100 (W.D. Ky. 2000). While an appeal order is pending, the trial court retains jurisdiction to implement or enforce the order. In re Alexander, 236 B.R. 679 (Bkcy. D. Minn. 1999). Failure to file a notice of appeal within the time frame contained in the Federal Bankruptcy Rules is fatal. The time limits for filing a notice of appeal are mandatory and jurisdictional. The appellate court has no subject matter jurisdiction over an untimely appeal. In re Rashid 210 F.3d 201 (3d Cir. 2000).

EVEN THOUGH THIS ORDER IS FINAL AND APPEALABLE AND I FILED IT ON TIME, DO I HAVE STANDING TO COMPLAIN ABOUT THAT CLEARLY ERRONEOUS RULING?

Standing can be a determinative issue in a bankruptcy appeal. The rules on standing, particularly in the First Circuit, are extremely limiting. Standing can limit both a creditor and a debtor's right to prosecute an appeal. If you are an appellant you should examine your standing thoroughly before appealing. If you are an appellee, examine the status of the appellant carefully, you may be able to dismiss the appeal without reaching those sticky rulings of fact and law, which could become unglued on appeal.

In order to have appellate standing, the appellant must be a "party aggrieved." That is, the bankruptcy court's decree must have diminished its property, increased its burdens, or impaired its own rights, not someone else's rights. In re San Juan Hotel Corp., 809 F.2d 151, 154 (1st Cir. 1987). (Emphasis added). This standard is significantly narrower than the Article III constitutional standard that appellant need only to allege an injury fairly traceable to wrongful conduct. The right to appellate review in bankruptcy proceedings is limited to "those persons

whose rights or interests are directly and adversely affected pecuniarily by the order or decree of the bankruptcy court." San Juan Hotel, supra at 154. For example, the First Circuit held in In Re Dien Host, 835 F.2d 402, 404-406 (1st Cir. 1987) that a shareholder of a debtor had no appellate standing to appeal the propriety of debtor corporation's assumption of a lease. The First Circuit's rationale was that the shareholder was not directly affected by the bankruptcy court's order, but only affected derivatively as an equity holder of the debtor. Id. at 404-406. "

In Davis v. Cox 356 F.3d 76, ft. nt. 15, which involved the disposition of escrowed funds in a divorce proceeding, the First Circuit noted that if the non-debtor did not have an interest in funds at the commencement of the case, he had no standing to appeal the order of the bankruptcy court with regard to the disposition of the funds. Similarly, a Chapter 7 Debtor has no standing to contest the sale of his assets in a Chapter 7 case unless he can demonstrate that there would be a surplus in the estate payable to him. See Spenlinhauer v. O'Donnell 261 F.3d 113 (1st Cir. 2001).

If the estate is insolvent, the Debtor does not have a direct pecuniary interest affected by the sale of estate property.

In Spenlinhauer the First Circuit raised the standing issue ab initio and dismissed the case on such basis because the record did not demonstrate how the Debtor was affected pecuniarily by a sale of real estate by the Chapter 7 Trustee. It has been held that Debtor's may not appeal the confirmation of creditor filed competing plan of reorganization unless there is a solvent estate because confirmation only directly pecuniarily affects the creditors who are to be paid under a plan of an insolvent debtor. In essence, equity has no standing in an insolvent estate to contest a competing plan on appeal. See In re Umpqua Shopping Center, 111 B.R. 303, 305 (BAP 9th Cir. 1990)(the bankruptcy appellate panel held that the debtor did not show it was harmed by a classification scheme pertaining to unsecured creditors and that the debtor lacked standing to

appeal the confirmation of a competing plan proposed by one of the debtor's creditors); In re Evans Products Co, 65 B.R. 870, 874 (S.D. Fla 1986), in which the district court, citing Holywell Corp. v. Bank of New York, 59 B.R. 340, 349 (S.D. Fla. 1986), held that the debtor did not have standing to raise the rights of "wrongly" classified creditors vis-a-vis each other as a means to attack overall reorganization plan. The court stated "[a]ppellants' have standing only to challenge those parts of a reorganization plan that affects [sic] their direct interests." In re B. Cohen & Sons Caterers, 124 B.R. 642, 647 (E.D. Pa.1991) held that unimpaired creditors have no standing to challenge those portions of a reorganization plan that do not affect their direct financial interests.

Recently, the District Court has ruled in an unpublished opinion that a competing plan proponent does not have standing to appeal the approval of the debtor's plan over its plan, when no unimpaired creditors have appealed the confirmation of the Debtor's plan. The District Court noted that the appellant/plan proponent was not affected by the Debtor's plan since it did not hold a claim against the debtor that was adversely affected pecuniarily by the Debtor's confirmed plan.

Not only does the debtor have to demonstrate direct pecuniary impact of an order, but that the debtor's appellate issues are limited to its own standing, and do not raise the issues of others. In Kane v. Johns-Manville Corp., 843 F.2d 636, 641 (2nd Cir. 1988) the Second Circuit held that the appellant had been pecuniarily affected by the bankruptcy's court's order, but ruled that the appellant still had no standing to raise issues affecting only third parties. Kane, supra at 643.

The Circuit Court will only review a "person aggrieved" determination for clear error. See In re El San Juan Hotel, 809 F.2d 386 (1992).

Overall, practitioners should be aware that standing is very limited in the bankruptcy appellate context and can be a determinative issue in an appeal. There is no specific rule of

bankruptcy procedure that addresses how one raises standing. It can be raised by brief, by motion, or presumably at any point in the proceedings by the parties or the Court.

IF THE DEBTOR IMPLEMENTS THIS ORDER, WILL IT BE TOO HARD TO REVERSE AS A PRACTICAL MATTER?

In addition to standing, mootness is often a real issue for an appellant, particularly in a Chapter 11 case. Under applicable law and specifically Local Bankruptcy Rule 8005-1 "the filing of a notice of appeal does not stay the operation of the appealed order." Therefore, the appealed order may be implemented. If the appealed order is in a Chapter 11 and involves the consummation of complex transactions, mootness may be a viable appellate issue. The First Circuit has held that an appeal is moot if the requested relief would be either "inequitable or impracticable in light of the change in circumstances." See PSNH, supra at 473. In the PSNH case the First Circuit refused to review an appeal after substantial consummation of a confirmed plan since such unraveling on appeal would "present a daunting assignment for the Humpty Dumpty repairman" and would harm "innocent third parties who have extended credit, settled claims, relinquished collateral and transferred or acquired property in legitimate reliance on the unstayed order of confirmation." PSNH, supra at 473. The Court must "scrutinize each individual claim" raised by appellant and "test the feasibility of granting relief against the potential impact on the reorganization scheme as a whole." PSNH, supra at 473.

Other circuits have taken a similar approach. For example, the Bankruptcy Appellate Panel for the Tenth Circuit has held that it is impracticable to grant effective relief where the transfer of ownership occurred and distribution to creditors commenced, without adversely affecting third parties. In re Long Shot Drilling, Inc. 224 B.R. 473, 482 (BAP 10th Cir. 1998); See also In re Continental Airlines, 91 F.3d, 553, 560 (3rd Cir. 1996) (five factor test to determine

mootness)

As you can see from the cases above, mootness is an entirely factual determination by the appellate court and would involve submitting either with your brief or by separate motion the grounds for mootness with an affidavit from a fact witness to verify the post-order facts that demonstrate the inability to unwind the transaction authorized by the appealed order.

STATUTORY MOOTNESS: SALES ORDERS AND DIP FINANCING ORDERS, BOB KRAFT WINS AGAIN.

The concept of mootness is codified in two specific sections of the bankruptcy code dealing with sales and DIP financing orders. 11 U.S.C. §363(m) states that an appeal of a sale is moot if the sale is with a good faith purchaser and the sale has been consummated. Therefore, if the court approves the sale of a business or a specific asset to a good faith purchaser, unless an aggrieved party stays the sale prior to closing, if the transaction closes, the consummation of the sale cannot be undone if the order is reversed on appeal. Similarly any order approving DIP financing to a good faith lender cannot be reversed on appeal even if the lender knows about the appeal unless there is a stay pending appeal in effect prior to closing. 11 U.S.C §364(e).

Pursuant to 11 U.S.C. §363(m) and the case law interpreting it, absent a stay of a sales order, once a court authorized sale has been completed, any objection to the order is moot The First Circuit addressed §363(m) definitively in the Stadium Management Corp. case, which is the most important case in these materials since it involved Bob Kraft's purchase of Foxboro Stadium, which lead to his purchase of the Patriots, which led to the New England rather than St. Louis Patriots winning Super Bowl XXXVI and XXXVIII (which your author attended). See In Re Stadium Management Corp., 895 F.2d 845, 847-49 (1st Cir. 1990) ("neither of the appellants

requested a stay of the sale of the debtor pending appeal, so the sale has been completed. We hold that any objections to the sale and the related motions are now moot."); In re Gucci, 105 F.3d 837 (2nd Cir. 1997) (appellants moved for a stay pending appeal, but the transaction closed before the stay pending appeal was heard. The Second Circuit held that once a sale has closed "jurisdiction....is statutorily limited to the narrow issue of whether the property was sold to a good faith purchaser.") In re Bel Air Associates, Ltd., 706 F.2d 301 (10th Cir. 1983) ("...a court approved sale to a good faith purchaser cannot be set aside."). In Stadium management, the appellant argued that a lease transaction authorized by the sale of Sullivan Stadium could be appealed since it did not directly involve the sale approved by the Court. The Court viewing the transaction as a whole determined that the issue contested on appeal was an integral part of the sale order, was material and therefore included within the meaning and intention of §363(m). The appeal was dismissed.

If you are faced with a sale order or a DIP financing motion and the order includes a finding that the purchaser or lender is a purchaser in "good faith" you must seek and obtain a stay pending appeal prior to the closing or your appeal will be dismissed as moot. Unless the Court orders otherwise, all orders authorizing the use sale or lease of property are stayed for 14 days to give an aggrieved party the opportunity to seek and obtain a stay pending appeal. See FBR 6004(g). This period can be shortened for cause.

CAN I DO ANYTHING ABOUT MOOTNESS? :THE KICK'EM WHEN THEIR DOWN RULES.

Without a doubt Federal Bankruptcy Rule 8005 is my favorite bankruptcy rule. The Rule requires that a motion for a stay of a judgment, order or decree of a bankruptcy judge "must

ordinarily be presented to the bankruptcy judge in the first instance." The rule, in essence, requires counsel to go before the very judge that ruled against counsel, tell him/her that he or she is wrong and will be reversed on appeal, and request that he or she stay his or her ruling so that you can get it reversed on appeal. See Federal Bankruptcy Rule 8005– Or as I heard Bankruptcy Judge Haines once call it at a seminar several years ago- from the bankruptcy judge's perspective "It's the kick'em when their down rule." Make them come back so you can tell them once again they lose.

A motion for a stay pending appeal is governed by Federal Bankruptcy Rule 8005. It is supposed to be filed in the first instance with the Bankruptcy Court. If it is denied, it can be filed with the appellate Court. The rule suggests that such motion can be filed with the appellate court in the first instance, but the motion must state why relief was not obtained from the bankruptcy court. So the prudent move is to go to the bankruptcy court first. A motion for stay pending appeal can be filed at any time. Appellants should be mindful, however, of the fact that the appellee can consummate the transaction approved by the order appealed (unless it is automatically stayed for 14 days) and render the appeal moot, so there may be some need to move quickly. The Rule states that the Court ruling upon relief may condition relief on the posting of a bond. The determination of whether to grant or deny a stay is discretionary.

Generally, the standards to meet for obtaining a stay are the same as those to be met for the issuance of a preliminary injunction. See In re PSNH 116 B.R. 347 (Bkcy. D. N.H. 1990); In re Miraj and Sons, 201 B.R. 23 (Bkcy. D. Mass 1996). The movant must demonstrate that (1) there is a likelihood of success on the merits; (2) the movant will suffer irreparable harm; (3) the harm to the movant outweighs the harm to the opposing party (which may include by derivation other creditors in the case) and (4) the public interest will not be adversely affected by the issuance of the stay. In the view of the Miraj court, a stay cannot be granted if any of the four factors is absent. Of

Course, with regard to a motion before the bankruptcy court, the first factor may require the Court to find that it ruled improperly in the first instance and that it was likely to be overturned on appeal. As a result of the absurdity of such a reading of the likelihood of reversal on appeal standard, Judge Yacos concluded that the standard could be met with a finding that the movant had a "substantial" or "strong" case. See PSNH, 116 B.R. 348-49. If, notwithstanding Judge Yacos' practical reading of the requirement, the requirement needs to be literally satisfied, the only way one could see this occurring is if the Court was forced to apply controlling law in deciding the issue that is on appeal and the Court thought the controlling law was both wrong and would be overturned on appeal if the case at issue was ruled upon by the controlling appellate court. If possible, the best way to present the issue may be to tell the bankruptcy court it was correct under existing law, but the law would be modified or changed by the controlling appellate court.

The other standards are self-explanatory. One specific item-it is not irreparable harm if the appeal will be rendered moot by the implementation of the Court's order. To the extent that a stay will harm the appellee or its creditors, you should be prepared to have your client post a bond.

THE LIMITATIONS OF THE RECORD; THE DISTRICT COURT IS NUTS TOO, I'M GOING TO THE CIRCUIT; WHAT IF I GET THIS THING REVERSED, IS IT OVER?, DID THE COURT HAVE THE RIGHT TO DECIDE THIS THING IN THE FIRST PLACE?

What happens if the Appellant does not comply with the rules for prosecuting the appeal?

If the appellant filed a proper Notice of Appeal and then failed to either order the transcript, file the brief, designate the record, or comply with any other requirement under Rules 8006-8010, an appellee can move to dismiss the appeal under either Rule 8001 or 8011. A successful party can also move for damages and costs under Rules 8014 and 8020.

In this regard, there are a few issues that I have experienced where a Notice of Appeal is

filed and then the Appellant does not order the transcript because that, of course, requires the expenditure of money. An appellant's failure to order the transcript can and will be used against them. If the appeal involves only a matter of law, the appeal may not be dismissed. The First Circuit, however, has made it clear that factual findings cannot be reviewed on appeal without review of the entire record, which by definition includes the trial transcript. In Monteiro v. Poole Silver Co., 615 F. 2d 4, 8-9 (1st Cir. 1980) citing U.S. v. One Motor Yacht Named Mercury, 527 F.2d 1112 (1st. Cir, 1975); Moore v. Murphy, 47 F.3d 8, 10 (1st Cir. 1995) ("...we have held with a regularity bordering on the monotonous that, should the record provided on appeal prove to be so deficient as to preclude us from reaching a reasoned decision on the merits, 'it is the appellant who must bear the brunt of an insufficient record on appeal.'").

Rule 8006 requires the appellant to designate the issues on appeal within 14 days of filing the notice of appeal. If the appellant designates several issues, and then briefs only a portion of the issues designated, the issues not briefed are waived. Federal Bankruptcy Rule 8010(a) (1) (E) provides that the argument section of a brief must "contain the contentions of the appellant with respect to the issues presented." Appellant is not permitted to expand the scope of its brief in any reply brief or add new issues to its brief not contained in the original "Statement of Issues."

Oral Argument

If you want an oral argument you have to request one.

Appeal to the Circuit

If the appellant loses the appeal, the appellant has 30 days to appeal to the First Circuit. The Rules governing First Circuit appeals are contained in the New Hampshire Federal Court Rules.

Can I get any Money Back for Defending this Frivolous Appeal?

Rule 8014 and 8020 govern the ability to recover costs and damages for a frivolous appeal. Rule

8014 allows for the reimbursement of Costs. This does not include attorney's fees.

Subject Matter Jurisdiction.

It is well established that subject matter jurisdiction can be raised any time by anyone (including any appellate court, which may do so sua sponte). See Quinn v. City of Boston, 325 F.3d 18, 26 (1st Cir. 2003). This is a particularly acute issue in the bankruptcy context because the Court is a court of limited jurisdiction and even more limited powers to issue final orders, see discussion of In re Sheridan infra. Is there anything that can be done about this problem? Well, maybe. The 5th Circuit has held in the Shoaf case that if the Bankruptcy Court determined that it had subject matter jurisdiction over an issue, and the order was not appealed, the issue of subject matter jurisdiction was finally determined by the bankruptcy court and cannot be appealed or raised sua sponte in an appellate court. In the Shoaf case, it is pretty clear the bankruptcy court ruled upon a matter that it neither had jurisdiction over nor was a core proceeding. Nevertheless, the Fifth Circuit held that since the court determined it had subject matter jurisdiction, and that issue was not challenged, the matter was final and could not be appealed. Therefore, always put in your orders that the Court determined it has jurisdiction over the subject matter to attempt to obtain a safe harbor under the Shoaf rationale for any appeal. It is unclear how recent Supreme Court cases on core v. non-core proceedings affect this analysis.